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No. 86-220

In The
Supreme Court of the United States
October Term, 1986

JAMES E. WALDRON, JACK HOBBS, and all Retired Federal Officers, Agents, and Employees Similarly Situated in Georgia,

Petitioners,

vs.

MARCUS COLLINS, Individually and In His Capacity as Georgia State Revenue Commissioner,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari solely to determine if the Eleventh Circuit Court of Appeals improperly failed to address certain arguments advanced by petitioners during the appeal of the district court's interlocutory order pursuant to 28 U.S.C. § 1292(b), where petitioners can obtain a ruling on the merits of any such arguments simply by appealing the district court's final order to the court of appeals.

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Petitioners,

vs.

MARCUS COLLINS, Individually and In His Capacity as Georgia State Revenue Commissioner,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, the Revenue Commissioner of the State of Georgia, respectfully opposes the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. The petitioners wish this Court to grant certiorari solely to determine if the Eleventh Circuit improperly failed to address certain arguments advanced by petitioners during the appeal of the district court's interlocutory order pursuant to 28 U.S.C. § 1292(b). Because the petitioners can obtain a ruling on the merits of any such arguments simply by appealing the district court's final order in this case to the court of appeals, the procedural question posed by petitioners is merely of academic interest and of insufficient importance to warrant this Court's review.

STATUTORY PROVISIONS

(1) 28 U.S.C. § 1292(b):

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(2) 28 U.S.C. § 1341 (Tax Injunction Act):

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

———o———

STATEMENT OF THE CASE

Petitioners, a group of federal retirees residing in Georgia, brought the present class action in federal district court for the Southern District of Georgia, contending that the State of Georgia could not (for various constitutional and statutory reasons, including 4 U.S.C. § 111

and equal protection) subject their retirement income to state income taxation. (Petitioners' Appendix, page 5, hereinafter cited as "Pet. App.") Petitioners (hereinafter referred to as "the taxpayers") requested various types of declaratory and injunctive relief against Marcus Collins, Georgia State Revenue Commissioner, and the State of Georgia. (Pet. App. 6.)

Commissioner Collins and the State of Georgia moved to dismiss the taxpayers' complaint for lack of subject-matter jurisdiction, relying on the Tax Injunction Act (28 U.S.C. § 1341) and the Eleventh Amendment. After a hearing on the motion to dismiss filed by Commissioner Collins and the State of Georgia, the district court dismissed the State as a defendant. The district court denied Commissioner Collins' motion to dismiss, however, and granted the taxpayers leave to amend their complaint. (Pet. App. 6.)

In accordance with the district court's instructions, the taxpayers filed an amended complaint, which added the Georgia Department of Revenue as a defendant and included a claim under 42 U.S.C. § 1983 seeking $300,000,000 in state income tax refunds and $300,000,000 in other damages. Commissioner Collins and the Georgia Department of Revenue moved to dismiss the taxpayers' amended complaint for lack of subject-matter jurisdiction, again asserting the Tax Injunction Act and the Eleventh Amendment. (Pet. App. 6.)

The district court granted the Georgia Department of Revenue's motion to dismiss, but denied Commissioner Collins' motion to dismiss. The district court held that Georgia's statutory procedures for litigating state income

tax questions were not "plain, speedy and efficient" within the meaning of the Tax Injunction Act, since none of Georgia's remedies permitted class action litigation. At the same time, the district court certified its order to the Eleventh Circuit for immediate review pursuant to 28 U.S.C. § 1292(b). (Pet. App. 6.) The Eleventh Circuit granted Commissioner Collins' petition to appeal the district court's order, and on May 6, 1986, the court of appeals reversed. (Pet. App. 4 through 11.)

On August 18, 1986, the district court entered its order adopting the judgment of the Eleventh Circuit, and on August 21, 1986, in accordance with such order, the district court entered judgment in favor of Commissioner Collins. (Respondent's Appendix, pages 1 and 2).

—o—

SUMMARY OF ARGUMENT

The taxpayers ask that the Court grant certiorari solely to determine if the Eleventh Circuit improperly failed to address certain arguments advanced by the taxpayers during the court of appeals' review of the district court's interlocutory order in this case. The taxpayers can easily, however, appeal the district court's final order in this case, obtain a ruling from the Eleventh Circuit itself regarding the scope of its earlier decision, and get a decision from the court of appeals on the merits of any remaining arguments. The procedural question posed by the taxpayers is merely of academic interest to the case and of insufficient importance to warrant this Court's review.

—o—

ARGUMENT

Because none of Georgia's statutory procedures for litigating state income tax questions permits class action litigation, the district court held that Georgia's remedies are not "plain, speedy and efficient" within the meaning of the Tax Injunction Act and denied Commissioner Collins' motion to dismiss the taxpayers' complaint for lack of subject-matter jurisdiction. The taxpayers apparently do not contend that the Eleventh Circuit erred in deciding that the absence of a class action mechanism did not make Georgia's tax procedures inadequate for purposes of depriving the federal court of jurisdiction. However, the taxpayers argue that the Eleventh Circuit's review of the district court's order was improperly limited to the stated reason for the district court's ruling—i.e., the unavailability of a class action in state court for cases of this nature—and that the Eleventh Circuit should have considered all arguments in support of the district court's refusal to dismiss the complaint against Commissioner Collins.

Despite the taxpayers' contention that the Eleventh Circuit applied an incorrect standard of review in reaching its decision, it is apparent that the taxpayers' complaint actually concerns what the taxpayers believe to be the limited scope of the court of appeals' review. Those circuits directly considering the question have held that an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is from the order of the district court rather than from the opinion underlying the order, that the appellee can assert in the court of appeals any ground in support of the district court's order (whether or not that ground was

relied upon or even considered by the district court in its opinion), and that the court of appeals, if it considers any of the appellee's arguments to have merit, should affirm the district court's order rather than reverse. *See Ducre v. Executive Officers of Halter Marine, Inc.*, 752 F.2d 976, 983 n.16 (5th Cir. 1985); *Angle v. United States*, 709 F.2d 570, 573 (9th Cir. 1983); *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 246 (7th Cir. 1981); *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494, 502 (3rd Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980). *Cf. Federal Deposit Insurance Corp. v. Dye*, 642 F.2d 833, 837 (5th Cir. 1981) (separate interlocutory orders other than the one certified for review may not be considered). *See generally* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3929 at 143-45 (1977); Note, *Interlocutory Appeals Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 628-29 (1975). Commissioner Collins agrees that this is the preferred way to handle interlocutory appeals pursuant to 28 U.S.C. § 1292(b), and took this position before the Eleventh Circuit.

Commissioner Collins does not concede that the Eleventh Circuit in fact applied 28 U.S.C. § 1292(b) in a manner narrower than that discussed above. Despite this possible point of contention, however, this case presents no issues which warrant resolution by this Court. The taxpayers believe the court of appeals erred in not addressing, at the time of the interlocutory appeal, all of their arguments in support of the district court's order. The district court's final order in this case is now subject to appeal to the Eleventh Circuit pursuant to 28 U.S.C. § 1291. The taxpayers can easily, without the intervention

of this Court, appeal the district court's final order and obtain a ruling from the Eleventh Circuit itself regarding the scope of its earlier decision. If the Eleventh Circuit confirms that its previous decision was meant to dispose of all of the taxpayers' arguments, it will be evident that the error upon which the taxpayers base their petition for certiorari did not occur.

Certiorari would be unnecessary to this case even if the Eleventh Circuit clearly meant to consider only that argument adopted by the district court as the basis for its interlocutory order. Review on writ of certiorari is a matter of judicial discretion and should be granted only when there are special and important reasons for it. U.S. Sup. Ct. Rule 17; *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 73 (1955). The refusal of the Eleventh Circuit to consider additional arguments, based on its interpretation of the scope of review in interlocutory appeals pursuant to 28 U.S.C. § 1292(b), would merely reserve such arguments for a later stage in the proceedings. This Court does not need to issue certiorari in order to secure for the taxpayers a full review of all their arguments; such a review is readily available in the Eleventh Circuit pursuant to an appeal of the district court's final order, with the right to petition this Court for certiorari following any later ruling by the court of appeals.

———o———

CONCLUSION

The taxpayers' petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CIVIL ACTION NO. 185-39

JAMES E. WALDRON, et al.,

Plaintiffs

vs.

MARCUS COLLINS, Individually and in His Capacity as Georgia State Revenue Commissioner,

O R D E R

(Filed Aug. 18, 1986)

The Judgment of this Court in the above entitled having been reversed,

IT IS HEREBY ORDERED that the judgment of the Eleventh Circuit is made the judgment of this Court.

This 18th day of August, 1986.

/s/ Dudley H. Bowen, Jr.
Judge, United States District Court

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

JUDGMENT IN A CIVIL CASE

CASE NUMBER CV185-0039

JAMES E. WALDRON, et al.

v.

MARCUS COLLINS, Individually and in His Capacity as Georgia State Revenue Commissioner

( ) *Jury Verdict.* This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) *Decision by Court.* This action came on for decision before the Court. The issues have been appealed and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the August 18, 1986 order of this Court adopting the Judgment of the United States Court of Appeals for the Eleventh Circuit, JUDGMENT is hereby entered in favor of the defendant and against plaintiffs. Costs are hereby assessed against plaintiffs, to be taxed by the Clerk of Court.

APPROVED:

/s/ Dudley H. Bowen, Jr., Judge

August 21, 1986
Date

Henry R. Crumley, Jr.
Clerk

/s/ Linda J. Flanders
(By) Deputy Clerk